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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

LARRY MORSE, as District Attorney, etc.,

Plaintiff and Respondent,

v.

NORMAN BRAND, as Administrative Hearing
Officer, etc.,

Defendant and Respondent;

DAVID SANDHAUS,

Real Party in Interest and Appellant,

COUNTY OF MERCED,

Real Party in Interest and Respondent.

F072279

(Super. Ct. Nos. CVM015423)

OPINION

APPEAL from a judgment of the Superior Court of Merced County. Louis F. Bissig and Donald E. Shaver, Judges. (Retired Judges of the Kings and Stanislaus Sup. Cts. assigned by the Chief Justice pursuant to article VI, § 6 of the Cal. Const.)

Bennett, Sharpe, Delarosa, Bennett & Licalsi and Barry J. Bennett for Real Party in Interest and Appellant David Sandhaus.

No appearance for Defendant and Respondent Norman Brand.

James N. Fincher, County Counsel, and Roger S. Matzkind, Deputy County Counsel, for Plaintiff and Respondent Larry Morse and Real Party in Interest and Respondent County of Merced.

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Real party in interest David Sandhaus, a Deputy District Attorney for Merced County (Sandhaus), appeals from a judgment granting a mandate petition. The judgment, which was issued on the petition of plaintiff Larry Morse, in his official capacity as the District Attorney of Merced County (Morse), and real party in interest the County of Merced (County) (collectively respondents), set aside the decision of Administrative Hearing Officer Norman Brand (AHO), which was in Sandhaus's favor on a grievance Sandhaus had submitted over his pay and work location. On appeal, Sandhaus contends that Morse did not have standing to file the petition and the County was improperly joined as a party. Finding no merit to Sandhaus's contentions, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The Underlying Proceeding

In June 2011, the County and the Merced County Attorneys' Association (Association), which governs deputy district attorneys (DDAs) and other County employees, entered into a new Memorandum of Understanding (MOU). Prior to this, Morse had discretion to assign eight level IV DDAs to special assignments, for which they could receive a 10 percent salary increase at Morse's discretion (the Super IV program). The new MOU eliminated the Super IV program and replaced it with a limited extension of the program for the two DDAs who then were receiving the 10 percent salary increase (premium pay), one of whom was Sandhaus. Continued receipt of the premium pay was contingent on the two DDAs remaining in their special assignments.

In the fall of 2011, Morse circulated a new Merced County District Attorney's Office Policies and Procedures Manual (Manual) to the DDAs, and instructed them to sign a statement acknowledging receipt of the Manual and agreeing to adhere to its

provisions. Sandhaus did not sign the acknowledgment at first, but when he finally did so on January 3, 2012, he struck the section which stated he was expected to adhere to the Manual's provisions and replaced it with a statement that he believed the Manual inaccurately reflected the new MOU's provision concerning the limited extension of the Super IV program. After Morse told Sandhaus he must sign the acknowledgment without amendment or face disciplinary action for insubordination, Sandhaus signed the original acknowledgment.

Sometime in January 2012, Morse and his chief deputies decided to reassign six DDAs to different locations or calendars, including reassigning Sandhaus to the Los Banos office from the civil calendar. Because Sandhaus would not be performing special assignment work in his new position, his premium pay was revoked pursuant to the provisions of the new MOU.

In March 2012, Sandhaus filed a written grievance pursuant to the grievance procedure contained in the County's Human Resources Rules and Regulations, Resolution No. 2007-22 (Resolution 2007-22). Sandhaus disputed the interpretation and application of the Super IV program to him, and requested reinstatement of his premium pay. When the grievance was not resolved either informally or formally, Sandhaus requested a hearing before an AHO.

A grievance hearing against the "District Attorney's Office of the County of Merced" was held before the AHO on October 3 and December 13, 2012. Sandhaus appeared through his attorney, while County Counsel defended the actions of the district attorney's office. The parties stipulated to the following issues: (1) did the County violate section 8c of the 2005 MOU when it eliminated Super IV pay for Sandhaus in the Los Banos assignment; and (2) did the district attorney's office retaliate against Sandhaus, in violation of section 10a of Resolution 2007-22, by assigning him to Los Banos and eliminating his Super IV pay because he asserted it had improperly stated the MOU's Super IV policy in the Manual.

On March 27, 2013, the AHO issued his Notice of Decision and Findings. The decision identified the parties as “David Sandhaus, Deputy District Attorney” and “Merced County (Office of the District Attorney)[,]” and stated that Sandhaus’s grievance was against the “District Attorney’s Office of the County of Merced[,],” which was short-cited as the “County.” On the first issue, the AHO found that when Morse moved Sandhaus to a general felony assignment, Sandhaus was no longer handling a specialty caseload and therefore, under the MOU, Morse had discretion to eliminate his premium pay. On the second issue, Brand found that Morse retaliated against Sandhaus by transferring him to Los Banos and eliminating his premium pay because he complained about the Manual, which deprived Sandhaus of rights guaranteed by the collective bargaining agreement, in violation of section 10 of Resolution 2007-22. The AHO ordered the “County” to make Sandhaus whole by (1) restoring his premium pay, (2) giving him retroactive premium pay along with statutory interest, (3) transferring him to the Merced office to any but “Civil DDA IV work,” and (4) paying into the retirement system the amount required to restore his benefits to what they would have been had he continuously received premium pay. The decision was emailed to the parties on March 27, 2013.

The County grievance procedure provides that AHO decisions are “final for purposes of internal administrative exhaustion[,],” and “are not advisory decisions or recommendations to the Board of Supervisors for their further action.” It also provides that “[a] party seeking to challenge the final decision of the [AHO] in superior or district court must file a petition in a court of competent jurisdiction within ninety (90) days after the Notice of Decision and Findings is mailed to the employee or will otherwise be considered to have waived the right to do so. (Code Civ. Proc. Section 1094.6.)”

The Petition for Writ of Mandamus

On June 20, 2013, Morse filed a petition for writ of administrative mandamus in his official capacity as the District Attorney of Merced County. Sandhaus filed a demurrer to the petition the following month.¹

On October 11, 2013, Morse, through the law firm Jones & Mayer, filed a First Amended Petition for Writ of Administrative Mandamus pursuant to Code of Civil Procedure section 1094.5, which named the AHO as respondent, and Sandhaus and the County as real parties in interest. The petition alleged the AHO's decision was invalid because (1) it was in excess of the AHO's jurisdiction, as the AHO did not have the authority to compel where Morse transferred or assigned Sandhaus as a DDA and therefore did not have the lawful authority to transfer Sandhaus to the Merced office; and (2) it was not supported by the findings, which were not supported by the evidence. Morse asked the trial court to issue a writ of mandate setting aside the AHO's decision and compelling him to render a new decision in Morse's favor.

The petition alleged that Morse was beneficially interested and aggrieved by the AHO's decision since, if the decision were allowed to stand, he would be forced to take actions that usurp his constitutionally and statutorily mandated authority, which the AHO had no power to control. The petition also alleged that the County (1) expressly waived any affirmative defense to being named as a real party in interest to the action based on the expiration of the applicable statute of limitations, (2) did not object to being named as real party in interest, even though such amendment occurred after the expiration of the applicable statute of limitations, and (3) had not authorized any other party to raise the statute of limitations as an affirmative defense on the County's behalf. The filing included the declaration of County Counsel James Fincher, which was incorporated into

¹ Neither the petition nor the demurrer are part of the appellate record, as the parties did not designate them for inclusion.

the petition by reference, who affirmed the County had no objection to being added as a real party in interest, waived the statute of limitations, and had not authorized anyone else to assert a statute of limitations defense on its behalf.

On November 26, 2013, Sandhaus filed a demurrer to the first amended petition on the grounds that Morse lacked standing to bring the action, and the County was an indispensable party which could not be added as a real party in interest because the statute of limitations had passed. Morse opposed the motion, arguing he had standing because he had a beneficial interest since he was prejudicially affected by the decision which stripped him of his statutory and constitutional authority to manage his office by determining where to assign his DDAs. He also argued the County was not an indispensable party and, even if it were, it had waived the applicable statute of limitations. Following a hearing on the demurrer before the Honorable Louis F. Bissig, Judge Bissig issued a written order denying the motion to strike, overruling the demurrer, and ordering Sandhaus to file an answer. In his answer, Sandhaus asserted ten affirmative defenses, including that Morse lacked standing to bring the action and the statute of limitations barred the County from participating in the action.

In February 2015, Morse and the County, through the County Counsel (who now represented both parties), jointly moved for issuance of a writ of mandate. They argued the AHO's decision was invalid because: (1) the AHO did not have authority to compel or limit where Morse transferred or assigned Sandhaus, or to order payment of premium pay; (2) the decision was not supported by the findings, as once the AHO found Morse could reassign Sandhaus, he had to uphold the denial of the grievance as a matter of law; and (3) substantial evidence did not support the AHO's finding that Morse retaliated against Sandhaus. Morse and the County asserted the trial court should issue a writ reversing the AHO and directing him to nullify his decision, except for the finding that Morse could reassign Sandhaus.

Sandhaus opposed the motion, arguing that (1) Morse lacked standing to bring the action because he was not a party to the grievance hearing and did not have a legal beneficial interest in the outcome of the hearing; (2) the AHO's decision was supported by substantial evidence; and (3) the AHO's remedy should be enforced as written. In reply, among other things, Morse addressed the standing issue, arguing that he had a beneficial interest in where his personnel were assigned, as well as the results of prosecutions, and the AHO's decision directly impeded his ability to function in these regards.

Hearing on the motion was held on April 10, 2015, before the Honorable Donald E. Shaver. On May 26, 2015, the trial court issued a judgment granting the peremptory writ of mandamus after considering the corrected administrative record, the moving, opposing and reply papers, and counsels' arguments. No one requested a statement of decision. The trial court ordered the issuance of a peremptory writ of mandamus setting aside, nullifying and rendering invalid the AHO's decision to the extent the AHO found the County violated section 10 of the Human Resources Rules and Regulation No. 2007-22 when Morse transferred Sandhaus to Los Banos and eliminated his premium pay, and ordered the County to make Sandhaus whole by restoring his premium pay, providing him retroactive premium pay, transferring him to the Merced office, paying into the retirement system, and paying statutory interest on the withheld premium pay. The trial court further ordered issuance of a peremptory writ of mandamus ordering the AHO to render a new decision finding that all issues decided in the underlying matter are resolved in favor of Morse and the County. A peremptory writ of mandamus in conformity with the trial court's order was issued the following day.

DISCUSSION

Sandhaus does not challenge the issuance of the writ based on any substantive error of law or fact. Neither does he contest the findings that are subsumed within the trial court's decision to issue the writ, including that the AHO did not have the authority

to issue the orders he did, the findings did not support the AHO's decision, and substantial evidence did not support the AHO's finding of retaliation. Instead, he raises two issues: (1) Morse lacked standing to petition for the writ; and (2) it was improper to allow the County to be added as a real party interest as it was an indispensable party added after the statute of limitations had passed. We address each issue in turn.

Standing

Sandhaus contends that Morse does not have standing, either as an individual, in a representative capacity, or as a citizen taxpayer, to challenge the AHO's decision. We disagree.

As a jurisdictional prerequisite, a petitioner must have standing in order to invoke the power of a court to grant writ relief. (*Waste Management of Alameda County, Inc. v. County of Alameda* (2000) 79 Cal.App.4th 1223, 1232 (*Waste Management*), disapproved on another point in *Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th 155, 167–168, 170 & fn. 5.) Code of Civil Procedure section 1086, which provides in pertinent part that a writ of mandate “must be issued upon the verified petition of the party beneficially interested[,]” establishes the standing requirement – “the writ will issue only at the request of one who is beneficially interested in the subject matter of the action.” (*Waste Management, supra*, 79 Cal.App.4th at p. 1232.)

“To establish a beneficial interest, the petitioner must show he or she has some special interest to be served or some particular right to be preserved or protected through issuance of the writ. [Citation.] Stated differently, the writ must be denied if the petitioner will gain no direct benefit from its issuance and suffer no direct detriment if it is denied.” (*Waste Management, supra*, 79 Cal.App.4th at p. 1232.) “The petitioner's interest in the outcome of the proceedings must be substantial, i.e., a writ will not issue to enforce a technical, abstract or moot right. [Citations.] The petitioner also must show his legal rights are injuriously affected by the action being challenged.” (*Braude v. City of Los Angeles* (1990) 226 Cal.App.3d 83, 87.)

As Morse points out, a county's district attorney holds the power over his or her DDAs' assignments and pay. The power to add and delete county employee positions, to fix the number and conditions of employment of county employees, and to adopt a budget is vested in a county's board of supervisors. (*Hicks v. Board of Supervisors* (1977) 69 Cal.App.3d 228, 234-236 (*Hicks*).) The board of supervisors, however, does not have the power to control the district attorney in the performance of his or her investigative and prosecutorial functions (*id.* at p. 241), or the manner in which funds allocated to the district attorney are to be expended, including the assignment of personnel (77 Ops.Cal.Atty.Gen. 82 (1994)). Since the district attorney has authority over his or her budget and personnel, the district attorney has an interest in both.

Here, the AHO's decision directly implicated Morse's interest in the management of his budget and the assignment of personnel. Specifically, the AHO found that when Sandhaus told one of the Chief DDAs that he was unwilling to sign the acknowledgment because he believed it infringed on his collective bargaining agreement rights, he engaged in the first step of the grievance procedure set forth in Resolution 2007-22 – a verbal presentation of the grievance to his supervisor. The AHO further found that Morse retaliated against Sandhaus for his grievance by cutting his pay and sending him to a less desirable work location in violation of Resolution 2007-22's provision that guarantees a grieving employee the right to present a grievance without fear of reprisal. The AHO listed three reasons for finding that Sandhaus was retaliated against, one of which was the lack of a financial reason for taking away Sandhaus's premium pay. On that point, the AHO found that neither Sandhaus nor the other DDA receiving premium pay had ever lost that pay due to a move, Sandhaus lost more pay than any other member of the bargaining unit, and there was not an economic necessity to take away Sandhaus's premium pay, as Morse conceded that pay had no effect on his ability to meet his budget. Accordingly, the AHO found that Morse violated Resolution 2007-22 and ordered him to make Sandhaus whole by reinstating his premium pay, giving him retroactive premium

pay, making retirement contributions based on the retroactive pay, paying him statutory interest, and transferring Sandhaus to any work in the Merced office except “Civil DDA IV” work.

We agree with Morse that the AHO’s findings and orders affected his authority to appoint deputies and to manage his budget. If a writ were issued overturning the AHO’s decision, Morse would directly benefit by being able to freely control his DDAs’ assignments and his budget, while if the writ were denied, he would suffer direct detriment, as he could be forced to reassign other DDAs to make way for Sandhaus’s return to the Merced office and to readjust his budget so he could make Sandhaus monetarily whole. Moreover, Morse’s legal right to manage his personnel and budget were injuriously affected by the AHO’s decision. Accordingly, Morse had a beneficial interest in the matter and therefore had standing to seek a writ of administrative mandamus.

In his opening brief, Sandhaus concedes that Morse has the right to make hiring and placement decisions for his own department, but asserts that right is not absolute, as it is limited by the MOU and applicable law, such as the California Fair Employment and Housing Act’s prohibitions against discrimination and retaliation. While we agree that a district attorney may not unlawfully discriminate against his or her DDAs, that does not mean that a district attorney does not have standing to challenge a decision that affects his or her right to manage the budget or to allocate personnel. For example, although Morse may not retaliate against Sandhaus because Sandhaus presented a grievance to his supervisor, Morse has standing to challenge the AHO’s finding that retaliation occurred because that finding injuriously affected his legal rights to manage his department and budget.

Sandhaus also contends that the power Morse relies on for standing actually belonged to the County’s board of supervisors, since, as described in *Hicks*, the state Constitution vests the board of supervisors with the power to provide for the number,

compensation, tenure, appointment and conditions of county employment. (*Hicks, supra*, 69 Cal.App.3d at p. 234.) While this is true, here the MOU gave Morse the discretion to end premium pay if Sandhaus was no longer handling a specialty caseload, which is precisely what the AHO found. Thus, the MOU, which Sandhaus argues Morse was bound by, gave Morse, not the board of supervisors, the discretion to move Sandhaus to an assignment that did not involve handling a specialty caseload and then to eliminate his premium pay.² The AHO's decision impacted this discretion when he found that Morse's exercise of his discretion was retaliatory and ordered him to essentially reinstate Sandhaus to his prior position. Therefore, Morse had a beneficial interest in the matter and standing to petition for a writ of administrative mandamus.³ Since Morse had

² For this reason, Sandhaus's reliance on *County of Kern v. Sparks* (2007) 149 Cal.App.4th 11, is misplaced. There, this court held that the Kern County Sheriff did not have the authority to unilaterally order premium pay for a commander when the board of supervisors had authorized premium pay for certain categories of employees under an MOU which did not include commanders. (*Id.* at pp. 15-16.) In contrast here, the MOU expressly gave Morse the authority to unilaterally eliminate Sandhaus's premium pay if he was no longer in a specialty assignment.

³ Sandhaus filed a request for judicial notice with his reply brief asking us to take judicial notice of the entirety of the County of Merced Human Resources Rules and Regulations Resolution No. 2007-22, under Evidence Code section 452, subdivisions (b) and (h), as a regulation and legislative enactment. He asserts the entire resolution is relevant because it will aid in our understanding of the division of powers between the County and its employees. In his reply brief, Sandhaus relies on certain provisions of Resolution 2007-22, namely sections 2U (Departmental Work Rules), 2V (County Executive Officer Authority) and 3J (Board Authority to Specify Salary), to argue that compliance with the directives of the AHO's order is under the board of supervisors', not the district attorney's, purview.

Respondents oppose the request, as neither the entirety of Resolution 2007-22, nor the provisions Sandhaus cites, were presented to either the AHO or the trial court. Morse also argues the cited provisions of Resolution 2007-22 are not relevant because Sandhaus failed to authenticate that the offered portions were in effect at the time of the hearing, his argument is a new one based on new evidence that was not presented below, none of the excerpts apply to the case at hand, and in any event, the resolutions cannot abrogate an elected official's express or implied statutory or constitutional authority.

standing on this basis, we do not address the other bases for standing that the parties raise in their briefs.

Joinder of the County

According to the County's grievance procedure, "[a] party seeking to challenge" the AHO's final decision must file a petition in superior court within 90 days after the decision is mailed to the employee, citing Code of Civil Procedure section 1094.6. Here, the AHO's decision was emailed to the parties on March 27, 2013, so the parties had until June 25, 2013 to file a petition challenging that decision. Morse filed his initial petition on June 20, 2013, which named AHO as respondent and Sandhaus as a real party in interest. On October 11, 2013 – more than 90 days after the statute of limitations expired – Morse joined the County as a party by filing a first amended petition which named the County as a second real party in interest and alleged the County had waived the statute of limitations defense.

Sandhaus challenged Morse's ability to add the County based on the statute of limitations by way of demurrer, which Judge Bissig overruled.⁴ On appeal, Sandhaus

We deny the request for judicial notice, as the materials were not presented below. (*Brosterhous v. State Bar of California* (1995) 12 Cal.4th 315, 325-326 ["An appellate court may properly decline to take judicial notice under Evidence Code sections 452 and 459 of a matter which should have been presented to the trial court for its consideration in the first instance."]; *DeYoung v. Del Mar Thoroughbred Club* (1984) 159 Cal.App.3d 858, 863 ["However, 'as a general rule, the court should not take [judicial] notice if, upon examination of the entire record, it appears that the matter has not been presented to and considered by the trial court in the first instance.'"]) Moreover, the portions of Resolution 2007-22 that Sandhaus relies upon are not relevant to the standing issue, as the MOU expressly gives Morse discretion in this matter.

⁴ Respondents contend that Sandhaus may not raise this issue now because it was not raised in his briefing for the hearing on their motion for issuance of a writ of mandate and, while he raised the issue on demurrer, Sandhaus did not identify the order overruling the demurrer in his notice of appeal. Sandhaus, however, was not required to identify the order in the notice of appeal, as an order overruling a demurrer is a nonappealable order that is reviewable on appeal from the final judgment and therefore need not be identified in the notice of appeal from that judgment. (*San Diego Gas & Electric Co. v. Superior*

contends this was error, arguing the County is an indispensable party to the petition and therefore was required to be joined as a party within the 90 day limitations period.

“The standard of review for an order overruling a demurrer is de novo. The reviewing court accepts as true all facts properly pleaded in the complaint in order to determine whether the demurrer should be overruled. [Citation.] A general demurrer will lie where the complaint ‘has included allegations that *clearly* disclose some defense or bar to recovery.’ [Citation.] Thus, a demurrer based on an affirmative defense will be sustained only where the face of the complaint discloses the action is necessarily barred by the defense.” (*Casterson v. Superior Court* (2002) 101 Cal.App.4th 177, 182-183.)

We need not decide whether the County is an indispensable party because, even if true and the limitations period required it to be joined as a party within 90 days, it expressly waived the statute of limitations defense. As respondents assert, the statute of limitations is a special, personal defense, which may be waived or asserted. (*Union Sugar Co. v. Hollister Estate Co.* (1935) 3 Cal.2d 740, 744-745.) As such, the defense belongs to the party entitled to rely on it, here, the County. (See *Bell v. Travelers Indem. Co.* (1963) 213 Cal.App.2d 541, 547 [the statute of limitations “gives to the party entitled to rely upon it a ‘special defense, personal in its nature’; it is a “ ‘personal privilege’ to be asserted or waived at the option of the one entitled to assert it”].) Thus, the defense does not belong to Sandhaus and he cannot assert it.

Sandhaus argues this “ignores the fundamental issue of fairness to defendants who should be able to predict which parties, and arguments, they will have to defend against[,]” citing *Sierra Club, Inc. v. California Coastal Com.* (1979) 95 Cal.App.3d 495 (*Sierra Club*). But in *Sierra Club*, not only had the indispensable party been added after

Court (1996) 13 Cal.4th 893, 912-913 [“an order overruling a demurrer is not directly appealable but may be reviewed on an appeal from the final judgment”].) Therefore, the order need not be identified in the notice of appeal from the judgment. (*Gavin W. v. YMCA of Metropolitan Los Angeles* (2003) 106 Cal.App.4th 662, 668-669.)

the limitations period had run, that party raised the statute of limitations defense in the trial court; the appellate court concluded he could not be made a party to the action because the statute of limitations had run and he was unwilling to waive that defense. (*Id.* at pp. 501-502.) In contrast here, although the County was made a party after the limitations period ran, it waived the statute of limitations defense. “[A] statute limiting the time within which actions shall be brought is for the benefit and repose of individuals, and not to secure general objects of policy or morals. Its protection may, therefore, be waived in legal form, by those who are entitled to it; and such waiver, when acted upon, becomes an estoppel to plead the statute.” (*Atlas Finance Corp. v. Kenny* (1945) 68 Cal.App.2d 504, 515.) Since the County expressly waived the limitations period, the trial court did not err in overruling Sandhaus’s demurrer with respect to the joinder of the County to the action.

DISPOSITION

The judgment is affirmed. The request for judicial notice is denied. Costs on appeal are awarded to respondents Larry Morse and County of Merced.

GOMES, J.

WE CONCUR:

HILL, P.J.

SMITH, J.